## APPELLATE CIVIL.

*Before Mr. Justice Ashworth and Mr. Justice Iqbal Ahmad.*

BINDESHRI UPADHIYA AND OTHERS (PLAINTIFFS) *v.* SITAL UPADHIYA AND OTHERS (DEFENDANTS)* 1927 *May*, 25

*Act No. IX of* 1908 *(Indian Limitation Act), articles* 120 *and* 126—*Joint Hindu family—Remedies of son against alienation of family property by father—Limitation.*

Article 126 of the Indian Limitation Act, 1908, is based upon the principle that a son's knowledge of alienation by his father ordinarily arises when he sees the alienee in possession. In cases where the alienee never gets possession, no limitation can arise under article 126. In such cases the right of the son will amount merely to obtaining a declaration that the deed is invalid and the limitation prescribed for such a suit is that provided for by article 120.

*Held*, therefore, that article 126 does not apply to a suit by Hindu sons to set aside a mortgage made by the father in favour of persons who were already in possession under a previous mortgage. *Munia Goundan* v. *Ramasami Chetty* (1) referred to.

THE facts of the case, so far as they are necessary for the purposes of this report, appear from the judgement of the Court.

Pandit *Ambika Prasad Pande*, for the appellants.

Pandit *Uma Shankar Bajpai*, for the respondents.

ASHWORTH and IQBAL AHMAD, JJ. :—This second appeal arises out of a suit brought by the plaintiffs for a declaration that a certain mortgage-deed executed on the 22nd of May, 1915, by their father, the defendant No. 1, in favour of defendants Nos. 2 and 3 is invalid on the ground that their father executed the deed without legal necessity and that the property being an occupancy holding could not be transferred under the provisions of the

Second Appeal No. 1085 of 1925, from a decree of Ali Ausat, District Judge of Ghazipur, dated the 28th of February, 1925, reversing a decree of Raja Ram, Additional Subordinate Judge of Ballia, dated the 28th of March, 1924.

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Tenacy Act. Amongst other pleas the defendants took up the plea that the suit was barred by limitation. The trial court applied article 126 of the Limitation Act and found that the suit was maintainable as it was brought within 12 years of the date of the alienation impugned. In first appeal the District Judge held that article 126 of the Limitation Act was not applicable inasmuch as the plaintiffs were not asking for possession but only for declaration. It has been explained to us that the plaintiffs could not ask for possession inasmuch as, even if the deed in suit be set aside, the defendants are in possession under previous mortgages.

The sole point argued before us in this appeal is that the lower appellate court was wrong in refusing to apply article 126. It is argued that article 126 will apply even though the father's alienee does not get possession of the mortgaged property in cases where the interest actually mortgaged was not capable of physical possession. We are unable to accept this proposition. It is sufficient, in our opinion, to refer to the decision in *Munia Goundan* v. *Ramasami Chetty* (1). Article 126 is doubtless based upon the principle that a son's knowledge of alienation by his father ordinarily arises when he sees the alienee in possession. In cases where the alienee never gets possession, no limitation can arise under article 126. In such cases the right of the son will amount merely to obtaining a declaration that the deed is invalid. The limitation prescribed for such a suit is article 120, namely, six years. In this case six years having elapsed from the date of the alienation impugned, the suit was rightly held by the lower appellate court to be time-barred. For these reasons, we dismiss this appeal with costs.

*Appeal dismissed.*

(1) (1918) I.L.R., 41 Mad., 650.